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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE CITY OF LOS ANGELES, a Municipal Corporation, ROBERT F. GALLEGOS, JAN J. HARRIS, and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER and VICTOR BUTTLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether Section 525 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq.) may be applied to toll the running of a time period which is not a statute of limitations but instead a time period created by a state legislature to compel plaintiffs to expeditiously prosecute their civil lawsuit.
2. Whether Section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq.) may be invoked on the eve of the dismissal of an action to excuse compliance with a state procedural statute for the timely prosecution of civil lawsuits when no request for a stay

of proceedings had been made prior to the expiration of the time specified in the state statute.

3. Whether Section 521 of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq.) may be invoked to avoid dismissal of a civil lawsuit by a person no longer in active military service and at a time subsequent to the sixty day period following military service specified in Section 521.

PARTIES IN THE COURT BELOW

Leroy Buttler, Donald Buttler and Victor Buttler were Plaintiffs-Appellants in the court below. The City of Los Angeles, a Municipal Corporation, Robert F. Gallegos, Jan J. Harris and Dwayne T. Merrill were Defendants- Respondents in the court below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.	i
PARTIES IN THE COURT BELOW	iii
TABLE OF AUTHORITIES	vii
PETITION FOR WRIT OF CERTIORARI. . .	1
OPINION BELOW.	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.	3
STATEMENT OF THE CASE.	4
REASONS FOR GRANTING THE WRIT OF CERTIORARI	11
I. THE CALIFORNIA COURT OF APPEAL HAS INTERPRETED BOTH SECTION 525 AND 521 OF THE RELIEF ACT IN A MANNER IN CONFLICT WITH DECISIONS IN FEDERAL COURTS OF APPEAL.	11

Page

A. Application of Section 525 of the Relief Act to a time period not a statute of limitation is in direct conflict with a decision in a Federal Court of Appeal 12

B. The California Court of Appeal's interpretation of Section 521 of the Relief Act is in conflict with numerous Federal Court of Appeal decisions interpreting that same section. . . 20

II. THE COURT OF APPEAL IN THE INSTANT CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. 37

CONCLUSION 41

TABLE OF APPENDICES

APPENDIX A:

Opinion of the California Court of Appeal, Second Appellate District. A-1

APPENDIX B:

Postcard notification of denial of Petition for Rehearing. B-1

APPENDIX C:

Postcard notification of denial of Petition for Hearing in the California Supreme Court. C-1

APPENDIX D:

Sections 511, 521 and 525 of the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. §§501, et seq. D-1

APPENDIX E:

Section 583(b) of the California Code of Civil Procedure. E-1

TABLE OF *AUTHORITIES*

CASES — Page

Boone v. Lightner, 319 U.S. 561, 87 L.Ed. 1587 (1942) 21,32,38

Bradley v. United States, 410 U.S. 605, 93 S.Ct. 1151 (1973). 17

Breacher v. Breacher, 141 Cal.App.3d 89,190 Cal.Rptr. 112 (1983). . . . 28

Breckenridge v. Mason, 256 Cal.App.2d 121, 64 Cal.Rptr. 201 (1967). 13

Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205 (1937) 27

Colautti v. Franklin, 438 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979). 41

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). 12,13,14

Crowder v. Capital Greyhound Lines, 169 F.2d 674 (D.C. Cir. 1948). .31,35,36

Evans v. City of Los Angeles, 145 Cal.App.3d 142, 193 Cal.Rptr. 282 (1983) 28

CASES (Continued) Page

Gross v. Williams, et al.,
149 F.2d 84 (8th Cir. 1945). . . . 30

Hill v. City & County of
San Francisco,
268 Cal.App.2d 874,
74 Cal.Rptr. 381 (1969). 14

Johnson v. Johnson,
59 Cal.App.2d 375,
139 P.2d 33 (1943) 29

Miller & Lux, Inc. v. Superior Court,
192 Cal. 333,
219 P. 1006 (1923) 28

N.L.R.B. v. Amax Coal Co., A
Division of Amax, Inc.,
453 U.S. 322,
101 S.Ct. 2789 (1981). 17

Pacific Greyhound Lines v.
Superior Court,
28 Cal.2d 61,
168 P.2d 665 (1946). . . . . .passim
Russ v. Wilkins, 624 F.2d 914
(9th Cir. 1980). 15

Tabor v. Miller, 389 F.2d 645
(3rd Cir. 1968). 30,31

CASES (Continued) Page

Thornley v. Superior Court, 89 Cal.App.2d 662, 201 P.2d 567 (1949). 29

Tresway Aero, Inc. v. Superior Court, 5 Cal. 3d 431, 487 P.2d 1211 (1971) 28

White v. Chicago, Burlington & Quincy Railroad, 417 F.2d 948 (8th Cir. 1969). 16

Wolf v. C.I.R., 264 F.2d 82 (6th Cir. 1959). 17

Zitomer v. Holdsworth, 449 F.2d 724 (3rd Cir. 1971) . .17,18,19

STATUTES

California Code of Civil Procedure section 583(b) . . . . . .passim

Soldiers' and Sailors' Civil Relief Act, 50 U.S.C.App. §§501, et seq 2,6

28 U.S.C. Section 1257(3). 3,12

28 U.S.C. Section 2101(c). 3

50 U.S.C.App. Section 511. 34,36

50 U.S.C.App. Section 520. 19

STATUTES (Continued) Page

50 U.S.C.App. Section 521. . . . . .passim

50 U.S.C.App. Section 525. . . . . .passim

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IN THE
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THE CITY OF LOS ANGELES, a Municipal Corporation, ROBERT F. GALLEGOS, JAN J. HARRIS and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER and VICTOR BUTTLER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Petitioners, City of Los Angeles, Robert F. Gallegos, Jan J. Harris and Dwayne T. Merrill respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District filed in this case on

March 22, 1984.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District, applying the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq.) to excuse respondents' compliance with Section 583(b) of the California Code of Civil Procedure requiring timely prosecution of civil lawsuits is reported at 153 Cal.App.3d 520, 200 Cal.Rptr. 372, and is attached hereto as Appendix A.

JURISDICTION

Petitioners were Respondents in this case in the Court of Appeal of the State of California, Second Appellate District below. The original opinion and judgment was entered on March 22, 1984.

Petitioners' Petition for Rehearing in the California Court of Appeal was denied without opinion on April 13, 1984. (Appendix B.) Petitioners' Petition for Hearing in the California Supreme Court was denied without opinion on May 16, 1984. (Appendix C.) This Petition is timely filed within 90 days of that date (28 U.S.C. §2101(c)). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§511, 521, 525) Appendix D-1
2. California Code of Civil Procedure Section 583(b) Appendix E-1

STATEMENT OF THE CASE

On November 19, 1976 respondents Leroy, Donald and Victor Buttler (a father and his two sons) filed a civil lawsuit against the City of Los Angeles and three officers of the Los Angeles Police Department. Their complaint alleged causes of action against petitioners for assault and battery and false arrest and imprisonment. Petitioners filed their answer to the complaint on January 25, 1977, and the at-issue memorandum was subsequently filed on February 3, 1977. (Buttler v. City of Los Angeles, 153 Cal.App.3d 520, 522, 200 Cal.Rptr. 372, 373 (1984); Appendix A-3 to A-4.) In 1977, both parties engaged in discovery procedures preparatory to trial. (153 Cal.App.3d at

522, 200 Cal.Rptr. at 373; Appendix A-3 to A-4.)

During the years from 1978 to 1982 little activity occurred in the lawsuit in the trial court. Respondents were notified by the Los Angeles Superior Court that they were eligible to file a certificate of readiness to place their case on the court's "active" trial calendar, but no certificate was ever filed. Petitioners attempted to take respondent Victor Buttler's deposition in December, 1978 and again in February, 1980, but were informed he was unavailable. On November 19, 1981, the five-year period established by California Code of Civil Procedure Section 583(b) expired. This Section mandates the dismissal of a civil action

if it is not brought to trial within five years after being filed (Appendix E-1), although California courts have recognized certain exceptions excusing compliance.

On January 22, 1982, 63 days after the expiration of the five year period of California Code of Civil Procedure Section 583(b), petitioners filed a motion in Los Angeles Superior Court to dismiss respondents' action. Respondents opposed the motion asserting that the running of the five year period had been tolled by the operation of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.App. §§501, et seq., hereinafter Relief Act) for the entire period of Victor Buttler's military service. (153 Cal.App.3d at 523, 200 Cal.Rptr. at 374;

Appendix A-4.) For the first time the trial court was informed, by Victor Buttler's declaration attached to respondents' opposition papers, that Victor had entered military service on November 6, 1978, had been assigned to overseas duty in March of 1979, and had been discharged from active military service in June of 1981. (153 Cal.App.3d at 523, 200 Cal.Rptr. at 374; Appendix A-4.) Respondents asserted additionally that it had been "impossible, impracticable and futile" (a recognized exception excusing compliance with California Code of Civil Procedure Section 583(b)) for Victor's co-plaintiffs to proceed to trial in Victor's absence. After hearing on petitioners' motion on February 10, 1982,

the parties were permitted to file supplemental points and authorities and the matter was deemed submitted. On March 3, 1984, the Superior Court by minute order granted petitioner's motion to dismiss pursuant to California Code of Civil Procedure Section 583(b).

Respondents appealed the trial court's decision to the Court of Appeal of the State of California for the Second Appellate District. The Court of Appeal considered the question of whether the trial court committed error in dismissing the action in the context of Section 525 of the Relief Act. (153 Cal.App.3d 523, 200 Cal.Rptr. at 374; Appendix A-6 to A-8.) The court found that application of Section 525 was mandatory and reasoned that it should be applied to suspend the

running of California Code of Civil Procedure Section 583(b)'s five year time period in spite of the fact that the five year period was admittedly not a "statute of limitation". (153 Cal.App.3d at 524-525, 200 Cal.Rptr. at 374; Appendix A-8.)

The Court of Appeal additionally examined the application of Section 521 of the Relief Act in respondents' case in light of the primary California Supreme Court authority interpreting this statute, Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665 (1946). (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-18.) Consistent with the California Supreme Court opinion, the Court of Appeal found the fact that Victor Buttler had never

applied for a stay of proceedings pursuant to Section 521 of the Relief Act irrelevant if the granting of a stay would have been mandatory if applied for. (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-19.) Further, the Court of Appeal opined that Victor may have been able to utilize Section 521 of the Relief Act to "block" the other respondents from proceeding to trial, thus bringing them within the recognized exception ("impossible, impracticable or futile") to California Code of Civil Procedure Section 583(b). (153 Cal.App.3d at 526-527, 200 Cal.Rptr. at 376; Appendix A-18 to A-19.) Accordingly, the Court of Appeal reversed the trial court's order of dismissal and remanded the matter to the trial court

for further proceedings to determine whether Leroy and Donald Buttler were excused from compliance with California Code of Civil Procedure Section 583(b). (153 Cal.App.3d at 527, 200 Cal.Rptr. at 376-377; Appendix A-20 to A-23.)[1/]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE CALIFORNIA COURT OF APPEAL HAS INTERPRETED BOTH SECTION 525 and 521 OF THE RELIEF ACT IN A MANNER IN CONFLICT WITH

[1/]Although the California Court of Appeal has remanded this matter to the trial court for "further proceedings", that Court's decision is nonetheless a "final judgment or decree" for purposes

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DECISIONS IN FEDERAL COURTS OF APPEAL.

A.

Application of Section 525 of the Relief Act to a time period not a statute of limitation is in direct conflict with a decision in a Federal Court of Appeal.

1/(continued)
of 28 U.S.C. §1257. Under this Court's practical rather than technical approach to interpreting "finality", assumption of jurisdiction in this case is proper. (Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).) Regardless of the outcome of proceedings in the trial court with regard to the rights of Leroy and Donald Buttler, the Court of Appeal's determination that Section 525 of the Relief Act applies to toll a procedural statute that is not a statute of

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California Code of Civil Procedure Section 583(b) was designed by the California Legislature to ". . . compel reasonable diligence in the prosecution of an action after it has been commenced;. . . ." (Breckenridge v. Mason, 256 Cal.App.2d 121, 126, 64 Cal.Rptr. 201, 204 (1967).) It permits a trial court, in its discretion, to

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1/(continued)
limitations will survive in California as the sole authoritative interpretation of that statute. (Id. at 420 U.S. 479, 43 L.Ed.2d 340.) Further, the survival of Leroy and Donald Buttler's action may be determined in the trial court on remand on the basis of California law interpreting California Code of Civil Procedure Section 583(b) rather than on the basis of any further construction of the Relief Act, thus making review of the court's interpretation of Section 521 of the Relief Act impossible. (Id.
(Continued)

dismiss any action for want of prosecution whenever a plaintiff has failed to diligently pursue his lawsuit. (Ibid.) It is not a "general statute of limitations" (Hill v. City & County of San Francisco, 268 Cal.App.2d 874, 876, 74 Cal.Rptr. 381, 382 (1969)), and has never been so interpreted prior to the

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1/(continued)
at 420 U.S. 491, 43 L.Ed.2d 341.) Finally, this Court's determination on the merits of the issues presented by this petition would terminate the litigation in this case since respondents' sole excuse for their failure to comply with the time requirements of California Code of Civil Procedure Section 583(b) was the tolling provisions of the Relief Act. (Id. at 420 U.S. 486, 43 L.Ed.2d 344.) Reaching the merits by granting the petition herein would thus be consistent with this Court's pragmatic approach to the issue of finality. (Ibid.)

case at bar.

In construing California Code of Civil Procedure Section 583(b)'s five year period for the "speedy prosecution" of civil lawsuits as a limitations period which is tolled by Section 525 of the Relief Act, the California Court of Appeal has ignored several fundamental rules of statutory construction. While admitting that the phrase "statutes of limitation" appears in the title of Section 525 (Buttler v. City of Los Angeles, supra at 153 Cal.App.3d 525, fn. 3, 200 Cal.Rptr. 375, fn. 3; Appendix A-13), the Court conveniently ignored the fact that a statute's title may reveal the clear intent of the statute (Russ v. Wilkins, 624 F.2d 914, 922 (9th Cir. 1980)) and should be utilized as an aid

to statutory construction. (White v. Chicago, Burlington & Quincy Railroad, 417 F.2d 948, 941 (8th Cir. 1969).)

Further, the Court of Appeal's interpretation of language in Section 525 of the Relief Act applying the Section to time periods for the "bringing of any action or proceeding" as broad enough to encompass California Code of Civil Procedure Section 583(b)'s five year "speedy prosecution" provision ignores the plain meaning of Section 525 and Congress' obvious intent. The terms "statute of limitation" and "bringing of any action" were clearly intended by Congress to be interpreted in their familiar legal sense as applicable only to time periods established by statute within which a plaintiff must commence

his lawsuit or lose his cause of action. (N.L.R.B. v. Amax Coal Co., A Division of Amax, Inc., 453 U.S. 322, 329, 101 S.Ct. 2789, 2794 (1981); Bradley v. United States, 410 U.S. 605, 609, 93 S.Ct. 1151, 1154 (1973).)

Federal Circuit Courts of Appeal have traditionally interpreted Section 525 of the Relief Act in its common sense manner as being applicable to statutes of limitation. (See e.g., Wolf v. C.I.R., 264 F.2d 82, 87-88 (6th Cir. 1959).) Moreover, the Third Circuit has ruled specifically that Section 525 of the Relief Act is inapplicable where the action has already been filed, a decision in direct conflict with the California Court of Appeal in the instant case.

In Zitomer v. Holdsworth, 449 F.2d

724 (3rd Cir. 1971), the plaintiff filed his lawsuit and served the defendant who entered an appearance in the action by answering. (Id. at 449 F.2d 725.) When the case was called for trial, the plaintiff was able to postpone the case on the ground that the defendant was in active military service. (Ibid.) The case was thereafter permitted to languish for six years without any effort by the plaintiff to prosecute the action, and the case was ultimately dismissed for want of timely prosecution. (Ibid.)

The plaintiff then appealed the dismissal asserting that Section 525 of the Relief Act excused his failure to prosecute the action. (Id. at 449 F.2d 726.) The Third Circuit summarily dismissed this contention stating:

> "This provision affords him no relief; it simply tolls the statute of limitations during the period of military service and has no applicability to an action duly filed and served within the applicable statute of limitations." (Ibid.)

Since the defendant in Zitomer had never sought a stay of the proceedings pursuant to Section 521 of the Relief Act, and the plaintiff made no attempt to obtain a default judgment in conformance with Section 520 of the Relief Act, the Third Circuit determined that the dismissal of plaintiff's action was proper. (Ibid.)

The Third Circuit's opinion in Zitomer is clearly in direct conflict with the California Court of Appeal's

opinion herein. The Court of Appeal's decision was reached only after distorting the clear meaning not only of California Code of Civil Procedure Section 583(b) but also of Section 525 of the Relief Act. This Court should therefore grant the within petition to clarify the application of Section 525 of the Relief Act to lawsuits already filed within applicable statutes of limitation and to resolve the conflict between a state court of last resort and a federal Circuit Court of Appeal.

B.

The California Court of Appeal's interpretation of Section 521 of the Relief Act is in conflict with numerous Federal Court of Appeal decisions interpreting

that same Section.

Ever since the California Supreme Court construed Section 521 of the Relief Act in Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 168 P.2d 665 (1946) without reference to this Court's prior interpretation of the same Section in Boone v. Lightner, 319 U.S. 561, 87 L.Ed. 1587 (1942), California courts have exhibited considerable difficulty applying the Relief Act in particular factual circumstances. The Court of Appeal's decision in the case at bar, while consistent with Pacific Greyhound, illustrates the confusion which surrounds application of the Relief Act in California and illuminates several areas in which California courts have interpreted Section 521 of the Relief Act

in a manner in conflict with federal Circuit Courts of Appeal.

The Court of Appeal in this case ruled that Victor Buttler was entitled to the protection of Section 521 of the Relief Act during the period of his military service and for 60 days thereafter. (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-17.) Applying the California Supreme Court's opinion in Pacific Greyhound, the Court of Appeal found that Victor Buttler's failure to apply for a stay of proceedings did not preclude the trial court from considering whether a stay would have been mandatory if applied for under Section 521 of the Relief Act when it was asked by petitioner to dismiss the action for failure to prosecute. (153

Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-19.) Further, the Court of Appeal raised but failed to resolve the question of whether Victor Buttler could have utilized Section 521 of the Relief Act to block his co-plaintiffs from proceeding to trial. (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-19 to A-20.) If Victor Buttler was entitled to stay the trial, and could block his co-plaintiffs from proceeding to trial, then all the plaintiffs would fall within the recognized exception to California Code of Civil Procedure Section 583(b) requiring mandatory dismissal for failure to bring a case to trial within five years. (153 Cal.App.3d at 526, 200 Cal.Rptr. at 376; Appendix A-20 to A-22.)

The Court of Appeal's rationale is

based on the assumption that a service person is permitted by the Relief Act to "sit on his rights" and violate with impunity the procedural rules of a local jurisdiction as long as he can demonstrate at the time he faces dismissal that the trial court, if he had applied, would have been required to grant him a stay of proceedings under Section 521 of the Relief Act. Following this assumption to its source in Pacific Greyhound Lines v. Superior Court, supra, at 28 Cal.2d 61, 168 P.2d 665, the problem facing California courts asked to interpret the Relief Act becomes clear.

In Pacific Greyhound, the defendants moved for a dismissal pursuant to California Code of Civil Procedure Section 583(b) because the plaintiff's

personal injury action had not been brought to trial within the applicable five year period. (Pacific Greyhound Lines v. Superior Court, supra at 28 Cal.2d 63, 168 P.2d 666.) The plaintiffs resisted the motion and filed an affidavit stating that, during the pendency of the suit, defense counsel had informed them that one of the co-defendants had enlisted in the military and that it had been orally stipulated that the matter would remain off calendar pending his return. (Id. at 28 Cal.2d 65-66, 168 P.2d 667.) Plaintiff relied on the Relief Act, stating that it would have been impossible, impractical and futile to prosecute the case in the absence of one of the defendants. (Id. at 28 Cal.2d 66,

168 P.2d 668.) The court also noted that the defendants did not deny the existence of the oral stipulation or the assertion by plaintiffs that prosecution of the action would be impossible and futile. (Id. at 28 Cal.2d 66-67, 168 P.2d 668.)

While finding that the oral stipulation was insufficient to defeat a dismissal, the California Supreme Court ruled that this evidence, and reasonable inferences drawn from it, could nonetheless be considered by the trial court on the question of whether it was in fact impossible or futile for plaintiffs to bring the matter to trial. (Id. 28 Cal.2d at 67, 168 P.2d 668.) The court found that the Relief Act, if applicable, was mandatory, and that the fact that no application had been made

for a stay irrelevant since it would have to have been granted if applied for. (Ibid.)

Pacific Greyhound can perhaps best be understood as an interpretation of California Code of Civil Procedure Section 583(b) rather than a definitive analysis of Section 521 of the Relief Act. When the Pacific Greyhound opinion was written in 1946, Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205 (1937) was still persuasive authority for the principle that the equitable doctrine of estoppel would not apply to excuse a plaintiff who allowed his case to remain unprosecuted beyond the expiration of the California Code of Civil Procedure Section 583(b) time period. (Id. at 9 Cal.2d 529-530, 71 P.2d 207; see also

Miller & Lux, Inc. v. Superior Court, 192 Cal. 333, 340, 219 P. 1006, 1008 (1923).) The California Supreme Court acknowledged as late as 1971 in Tresway Aero, Inc. v. Superior Court, 5 Cal.3d 431, 438, 487 P.2d 1211, 1216-1217 (1971), that conflict still existed on this question. Currently, however, California courts apply the estoppel doctrine to prevent dismissal of actions (see, e.g., Breacher v. Breacher, 141 Cal.App.3d 89, 92-93, 190 Cal.Rptr. 112, 114 (1983) and Evans v. City of Los Angeles, 145 Cal.App.3d 142, 149, 193 Cal.Rptr. 282, 286 (1983)), and if the California Supreme Court were asked today to decide Pacific Greyhound, it is conceivable that it would do so without reference to the provisions of the Relief

Act. The fact that the opinion in Pacific Greyhound ignored California cases clearly prohibiting a non-military party from asserting the Relief Act against a service person (Johnson v. Johnson, 59 Cal.App.2d 375, 382, 139 P.2d 33, 37 (1943); see also Thornley v. Superior Court, 89 Cal.App.2d 662, 663, 201 P.2d 567, 568 (1949)) is not as distrubing, therefore, given the actual basis for the Supreme Court's opinion.

The basic assumption of the California Supreme Court in Pacific Greyhound, that a service person need do nothing to protect his rights when suing or being sued civilly, has been perpetuated in California cases to this day and lies at the heart of the Court of Appeal's opinion challenged herein. This

assumption is in clear conflict with a variety of Federal Circuit Court of Appeal opinions interpreting Section 521 of the Relief Act.

For example, in Gross v. Williams, et al., 149 F.2d 84 (8th Cir. 1945), the Circuit Court determined that it was not error to deny a stay of proceedings pursuant to Section 521 of the Relief Act when the basis asserted for the stay was the "mere fact of service in the armed forces". (Id. at 149 F.2d 86.) Similarly, in Tabor v. Miller, 389 F.2d 645 (3rd Cir. 1968), the denial of a stay was upheld since the defendant service person failed to demonstrate that it would have been "impossible" for him to appear at trial. (Id. at 389 F.2d 647.) An assertion of "unavailability" or

"inconvenience" was simply not deemed sufficient to invoke the protection of Section 521 of the Relief Act. (Id. at 389 F.2d 646-647.)

Finally, in Crowder v. Capital Greyhound Lines, 169 F.2d 674 (D.C. Cir. 1948), the court upheld the dismissal of an action for lack of prosecution in spite of the plaintiff's assertion that he was entitled to a stay under the Relief Act. Some three years after the action had been filed, the defendant calendared the case for trial, and the plaintiff's attorney appeared and requested and received a stay on the ground that the plaintiff was in the Army. (Id. at 169 F.2d 674.) Two more years passed with no further activity and the defendant moved to dismiss for lack

of prosecution. (Ibid.) On appeal after the granting of the dismissal, the court upheld the dismissal ruling that the Relief Act ". . . must be construed as imposing some duty on the person seeking shelter under its terms;. . . ." (Id. at 169 F.2d 676.) The plaintiff's failure to timely prosecute his lawsuit thus was not excused.

The clear import of the above-cited federal opinions, taken together with this Court's interpretation of Section 521 of the Relief Act in Boone v. Lightner, supra, at 319 U.S. 561, 87 L.Ed. 1587, rebuts the assumption of the California Supreme Court in Pacific Greyhound. The conflict thus illustrated between a long line of federal cases interpreting Section 521 of the Relief

Act as requiring some affirmative action on the part of the service person to protect his rights and California cases sanctioning inaction should be resolved by this Court by granting the within petition. In the absence of an authoritative interpretation (the first that this Court would have made since 1942), California courts will continue to flounder under the burden of its Supreme Court's out-dated and erroneous interpretation.

A second area of conflict between the decision herein and a federal Circuit Court of Appeal is the fact that the benefits of Section 521 of the Relief Act have been extended to Victor Buttler at a time when he was not on active duty in military service. The operative dates

reveal that the lawsuit was filed on November 19, 1976, Victor entered the military on November 6, 1978 and was discharged in June of 1981, and the five year period prescribed by California Code of Civil Procedure Section 583(b) expired on November 19, 1981. (153 Cal.App.3d at 522-523, 200 Cal.Rptr. at 374; Appendix A-2 to A-4.)

Section 511(2) of the Relief Act (Appendix D-1) defines the "period of military service" as the time between the date of entering active service and the date of discharge. Section 521 of the Relief Act permits the stay of trial proceedings in an action only "during the period of [military service] or within sixty days thereafter." (Appendix D-2.) Thus, at the time respondents first

raised the issue of Victor Buttler's military service as a bar to a dismissal in their opposition to petitioner's January 22, 1982 motion to dismiss, Victor Buttler had been discharged from military service for approximately six months and was no longer eligible for the protection of Section 521 of the Relief Act.

In Crowder v. Capital Greyhound Lines, supra at 169 F.2d 674, the Circuit Court asked to review the dismissal of the plaintiff service person's lawsuit for failure to prosecute found that no evidence had been presented to the trial court showing that the plaintiff was, at the time of the dismissal motion, in military service. (Id. at 169 F.2d 676.) The Crowder court's affirmance of

the dismissal, taken together with Sections 511 and 521 of the Relief Act, reveal that the failure to assert current military service at the time a stay is sought or a dismissal resisted is fatal to the invocation of the Relief Act.

The Court of Appeal's finding herein that Victor Buttler was eligible for the benefits of Section 521 of the Relief Act, and its remand of the case to the trial court to consider whether Victor Buttler could have utilized Section 521 to block the prosecution of the case by his co-plaintiffs, is thus clearly in error and in conflict with the Circuit Court in Crowder. This conflict should also be resolved by granting the petition for writ of certiorari.

II.

THE COURT OF APPEAL IN THE INSTANT CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court of Appeal's decision in the instant case has raised an important question regarding the interpretation of a federal statute. The question of the applicability of Section 525 of the Relief Act to time periods not statutes of limitation, and the equally compelling question of the interpretation of Section 521 of the Relief Act to excuse inaction on the part of military personnel, are issues whose import extends far beyond the factual circumstances of the instant case. All branches of the armed forces

continue to induct military personnel and it takes little imagination to conclude that a large number of such personnel will reside in California, and a significant percentage of that number will at one time, before, during, or after their military service, be sued or wish to assert their own interests in a civil lawsuit. The impact of the Court of Appeal's decision is thus clearly significant in its effect on the people and courts of the State of California.

This Court has not authoritatively construed the Relief Act since 1942 in Boone v. Lightner, supra at 319 U.S. 561, 87 L.Ed.2d. Further, the question of the applicability of Section 525 of the Relief Act to state "speedy prosecution" statutes is one of first impression for

this Court. In light of the obvious continuing importance of uniform application of the Relief Act throughout the various state jurisdictions, this Court should therefore grant the within petition.

In addition, the decision in the instant case is not only erroneous but will literally create chaos in California's trial courts. The Court of Appeals' interpretation will hinder the effective administration of the Relief Act and is so inconsistent in theory that it leaves the intent and meaning of the Relief Act in a state of confusion. When faced with a motion to dismiss a service person's lawsuit for lack of speedy prosecution under California Code of Civil Procedure Section 583(b), is the

trial court to exercise the discretion granted to it under Section 521 of the Relief Act to stay the proceedings, or is it required by Section 525 to exclude all of the litigant's time in military service to determine whether the five year period has actually run? What is the purpose of Section 521 of the Relief Act if, under the Court of Appeals' interpretation, all time in military service is automatically excluded whether or not proceedings in the trial court are actually stayed?

The discretion granted by Congress to trial courts in Section 521 to determine whether a service person's rights would be prejudiced by proceeding with trial would be superfluous in light of the Court of Appeal's interpretation. What

discretion would a trial court have to exercise if all military time were automatically excluded by the mandatory provisions of Section 525 of the Relief Act? The Court of Appeal has interpreted the Relief Act in such a manner that Section 521 has been rendered inoperative, a clearly erroneous result. (Colautti v. Franklin, 439 U.S. 379, 392, 99 S.Ct. 675, 684, 58 L.Ed.2d 596 (1979).) Allowing this interpretation to stand as a definitive construction of the Relief Act would only add the burden of confusion to a judiciary already struggling under the load of uncertainty engendered by the California Supreme Court in Pacific Greyhound.

CONCLUSION

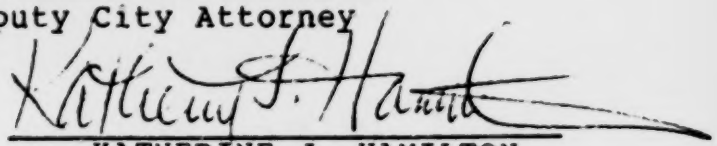
For the foregoing reasons it is

respectfully requested that this Court grant a writ of certiorari and set aside the decision of the California Court of Appeals, Second Appellate District.

DATED: August 10, 1984

Respectfully submitted

IRA REINER, City Attorney
JOHN T. NEVILLE
Senior Assistant City Attorney
RICHARD M. HELGESON
Assistant City Attorney
KATHERINE J. HAMILTON
Deputy City Attorney

By 

KATHERINE J. HAMILTON
Deputy City Attorney

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

LEROY BUTTLER, et al., Plaintiffs and Appellants.	2d Civ. 68467 (LASC No. C181 072)
vs.	
CITY OF LOS ANGELES, et al., Defendants and Respondents.	

APPEAL from an order of the Superior Court of Los Angeles County. Arthur Baldonado, Judge. Reversed.

Isaac & Marks and Godfrey Isaac and Rosalind Marks for Plaintiffs and Appellants.

Ira Reiner, City Attorney, John T. Neville, Senior Assistant City Attorney, Richard M. Helgeson, Assistant City Attorney and Katherine J. Hamilton, Deputy City Attorney for Defendants and Respondents.

This is an appeal from an order dismissing plaintiffs' action for failure to bring the case to trial within five years of its commencement and from an order denying plaintiffs' motion to vacate the order of dismissal. For the reasons set forth below, we reverse the dismissal order. We do not reach the order denying the motion to vacate.

FACTS AND PROCEEDINGS BELOW

On November 19, 1976, plaintiff Victor Buttler, his brother Donald, and

their father Leroy filed suit against the defendants City of Los Angeles and eight of its police officers. Their complaint alleged that plaintiffs had been the victims of false arrest, false imprisonment, assault and battery by the defendant officers.

Plaintiffs began to prosecute their action in a diligent manner. One week after defendants answered the complaint plaintiffs filed their At-Issue Memorandum. Plaintiffs responded to interrogatories propounded by defendants in May 1977 and in August 1977 propounded their own interrogatories to defendant.

The superior court issued its first notice of eligibility to file a certificate of readiness in March 1979. By that time plaintiff Victor Buttler was

on active duty in the United State Navy stationed on board a ship in Rota, Spain.

Victor Buttler commenced active military service on November 6, 1978. He was stationed in Spain during the period March 1979 through June 1981. He did not appear in response to defendants' notices of deposition in December 1978 and February 1980.

In January 1982 the matter not having been brought to trial within five years, defendants moved to dismiss pursuant to Code of Civil Procedure section 583(b). Plaintiffs resisted this motion on the ground that plaintiff Victor Buttler had been on active duty in the United States Navy between November 1978 and June 1981 and that the five-year period was suspended as to all three plaintiffs

during Victor Buttler's military service by reason of the Soldiers' and Sailors' Civil Relief Act (hereafter referred to as the "Act".)

At the hearing on defendant's motion to dismiss, the trial court made a tentative ruling denying the motion provided that plaintiffs move to specially set the matter for trial within sixty days. This ruling was made conditional on whether the Act applied to plaintiffs as well as defendants. The court requested supplemental points and authorities on this issue. After receiving the parties' supplemental briefs, the trial court granted defendants' motion to dismiss. Plaintiffs' motions for reconsideration and for relief on the ground of their

mistake of law were denied. Plaintiffs also requested a Statement of Position from the court regarding, inter alia, the application of the Act to plaintiff Victor Buttler. The court did not respond to this request.[1/]

DECISION

We first consider whether the trial court erred in dismissing Victor Buttler's action. The Act provides in

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[1/]We recognize that section 632 of the Code of Civil Procedure by its terms only applies to the trial of a question of fact. Nevertheless it would have been helpful if the trial court had clarified the ambiguity in the reasoning behind its order. We cannot determine, for example, whether the trial court believed that the Soldiers' and Sailors' Civil Relief Act does not apply to military personnel who are plaintiffs, or believed that the Act does not apply

(Continued)

relevant part:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service or by or against his

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1/(continued)

to Victor Buttler. Nor can we determine whether, in referring to the Act, the court was referring to sections 525 or 521 or both. Ordinarily the trial court's reasoning in granting or denying a motion is irrelevant but, as we explain infra, the way in which the court interpreted the Act does make a difference in this case with respect to the dismissal against appellants Donald and Leroy Buttler.

heirs, executors, administrators, or assigns . . . ." (50 U.S.C.App. §525.)

Application of the tolling provision of section 525 of the Act is mandatory as to any person in military service; it does not require a showing of prejudice by reason of such service. (Syzemore v. County of Sacramento (1976) 55 Cal.App.3d 517, 522-524.)

The only question is whether section 525 suspends the running of time limitations that are not statutes of limitations but which govern procedures in actions already brought such as the five-year limitation contained in section 583, subdivision (b) of the Code of Civil Procedure. We have found no

California case directly on point.[2/]

[2/] In Rauer's Law Etc. Co. v. Higgins (1946) 76 Cal.App.2d 854, the plaintiff contended that the five-year limitation period was tolled by section 525 of the Act. The court did not decide this question because it found that that section did not apply to suits such as plaintiff's filed before the passage of the Act. (Id., at pp. 857-858.)

In Thornley v. Superior Court (1949) 89 Cal.App.2d 662, the defendant moved to dismiss the action on the ground that he had not been served with a summons within three years of the commencement of the action. (Code Civ. Proc., §581, subd. (a).) The plaintiff argued that the time for service was tolled by section 525 while defendant was in the military. The court declined to construe section 525 as suspending the mandatory requirement of service noting that section 525 "was enacted for the benefit of one in the military services and that it is not available

(Continued)

From our examination of the purposes of the Act and the logical consequences of its language, we have concluded that section 525 tolls the five-year limitation period of Code of Civil Procedure section 583, subdivision (b) as to actions brought by members of the military service.

The purpose of the tolling provisions of the Act is to protect members of the military service who are unable to attend to their legal affairs

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2/(Continued)
beyond its express terms to his adversary to excuse his noncompliance with the mandatory provisions of the state statute." (Id., at p. 664.) The policy considerations in the instant case are significantly different from those in Thornley and compel a different result.

because they are stationed away from home in active service or recovering from injuries incurred in active service. (Cruz v. General Motors Corporation (S.D.N.Y. 1970) 308 F.Supp. 1052, 1057.) As one court noted, the Act "was intended to enable persons serving in the armed forces 'to devote their entire energy to the defense needs of the Nation' without the worries and distractions which are involved in the conduct of litigation." (Carr v. United States (4th Cir. 1970) 422 F.2d 1007, 1012.) And, in interpreting the predecessor of the current Act, it was stated that its "purpose [is] to extend protection to persons in military service in order to prevent injury to their civil rights during their terms of

service and to enable them to devote their entire energy to the military needs of the nation. . . . A statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed by the exacting duties required of him, and unable to give attention to matters of private business." (Clark v. Mechanics' American Nat. Bank (8th Cir. 1922) 282 F. 589, 591.)

We find no rational basis for applying section 525 of the Act to limitation periods for initiating an action but not applying it to the limitation period for bringing an action to trial. The language of section 525 does not use the words "statute of limitation" although this phrase was

surely in the lexicon on Congress in 1940.[3/] The language Congress chose, "any period . . . limited by any law . . . for the bringing of any action or proceeding in any court . . . ," is broad enough to include a law requiring dismissal unless an "action is brought to trial within five years . . . ." (Code Civ. Proc., §583, subd. (b).) Moreover, it is during the period between filing the complaint and bringing the action to trial that the "worries and distractions" of civil

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[3/]The phrase "statute of limitation" appears in a headnote to section 525 of West's United States Code Annotated (1981) at page 291. The phrase does not appear in the Act itself. (See Public Laws, Ch. 888, §205, 54 Stat. 1181.)

litigation will commonly arise necessitating the protection of section 525. Thus, we conclude that tolling the five-year limitation period is entirely consistent with the purposes of section 525. Indeed to hold otherwise would discourage persons who already have filed lawsuits from enlisting in the armed services. To serve their country they would have to risk dismissal of their actions for want of prosecution during a time they may not be in a position to diligently pursue those lawsuits.

Furthermore, to dismiss the action of a plaintiff in military service for failure to prosecute would be an idle gesture in many cases because a second action by that plaintiff would not be

time-barred by virtue of section 525's conceded applicability to statutes of limitation. (See Hill v. City and County of San Francisco (1969) 268 Cal.App.2d 874, 876; Billups v. Tiernan (1970) 11 Cal.App.3d 372, 375-376.) This point was succinctly made in Cahill v. Northeast Airlines, Inc. (1973) 344 N.Y.Supp.2d 372. There, the court held that dismissal of plaintiff's negligence action for want of prosecution was properly denied where plaintiff was in military service and a second action would not be time-barred due to the tolling provision of section 525. "If this action were dismissed for want of prosecution," the court observed, "a second action by [plaintiff] would not be time-barred by the applicable

Statutes of Limitation, by virtue of the tolling provisions contained in . . . [section 525] of the federal Soldiers' and Sailors' Civil Relief Act of 1940. . . . Under such circumstances . . . it would be an idle gesture to dismiss this otherwise dismissable action." (Id. at p. 373.) Since we construe section 525 to toll the five-year limitation period as applied to actions by members of the military service we avoid this anomalous result.

Our holding that section 525 tolls the period for bringing an action to trial only applies to Victor Buttler. As to him the time for bringing his claim to trial is tolled during the period he was in active military service. The Act does not apply

directly to co-plaintiffs Leroy and Donald Buttler who were not in military service during the course of this litigation. (Wanner v. Glen Ellen Corporation (D. Vt. 1974) 373 F.Supp. 983, 986.)

However, during the time he was on active duty and for sixty days thereafter, Victor Buttler also was entitled to the protection of section 521 of the Act which provides in relevant part, "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion,

and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." (50 U.S.C.App. §521.)

Our Supreme Court has interpreted section 521 as mandating a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal.2d 61, 67; see also, Rauer's Law, supra, 76 Cal.App.2d at p. 858; Kaiser Foundation

Hospitals v. Superior Court (1960) 185 Cal.App.2d 177, 182; and Boone v. Lightner (1942) 319 U.S. 561, 575.

Here no application for a stay was actually made but that does not preclude the court from considering, for purposes of section 583, subdivision (b), whether a stay would have been mandatory if it had been applied for. (Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d at p. 67; Rauer's Law, supra, 76 Cal.App.2d at p. 858.) If Victor Buttler could have invoked section 521 of the Act to block the other plaintiffs from going to trial then, as a matter of law, it would have been objectively impossible for them to prosecute their actions while he was in military service. Thus it may have been

"futile" for the other plaintiffs to have sought a trial while Victor was in the service since he would have been entitled to stay that trial.

It does not appear from the record that the trial court considered the possibility Donald and Leroy Buttler's prosecution of their claims in his absence could be prejudicial to Victor Buttler's ability to prosecute his action. The focus of the argument in the trial court was on whether Victor Buttler's absence was prejudicial to Donald and Leroy Buttler. Moreover, the trial court's tentative decision that it would overrule the defendant's motion if the Act applied to plaintiffs as well as to defendants coupled with its subsequent granting of the defendants'

motion to dismiss is some indication that the court did not believe the Act applied to plaintiffs and, therefore, did not consider the prejudice to Victor Buttler if his co-plaintiffs had proceeded to try their claims.

We recognize trial courts have wide discretion in weighing the factors excusing compliance with 583 (b) and ordinarily defer to their decisions. However, the absence of the statement of decision requested by appellants makes it impossible for this court to ascertain how much the trial court's rationale for dismissing Donald and Leroy's actions would be disturbed by our holding that 50 U.S.C. 525 tolled Victor's closely related action while he was in the service and our observation

that under 50 U.S.C. 521 Victor may have been entitled to stay the other actions as well as his own because of prejudice to him from a separate trial of those lawsuits. We are reversing the order of dismissal as to Leroy and Donald Buttler so that the trial court can reconsider the matter in this light. In doing so, we do not mean to dictate how the trial court exercises its discretion as to the dismissal of Donald and Leroy Buttler's actions. We only direct that it conduct an examination of this new configuration of factors and then apply its discretion to that altered set of facts.

DISPOSITION

The order dismissing the action is reversed and the case is remanded for further proceedings consistent with this

opinion.

CERTIFIED FOR PUBLICATION.

JOHNSON J.

We Concur:

SCHAUER, P.J.

THOMPSON, J.

APPENDIX B

POSTCARD NOTIFICATION OF DENIAL OF PETITION FOR REHEARING

BEST AVAILABLE COPY

Los Angeles, Cal. APR 13 1984, 19__

TITLE { Butler / City of L.A. } No. 68467

The Court:

PETITION FOR REHEARING DENIED.

CLAY ROBBINS, Clerk

CAM ① • OSP

APPENDIX C

POSTCARD DENIAL OF PETITION FOR HEARING IN THE CALIFORNIA SUPREME COURT

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 16 1984

I have this day filed Order HEARING DENIED

In re: 2 Civ. *No.* 68467

LEROY BUTTLER, et al.

vs.

CITY OF LOS ANGELES, et al.

Respectfully,

Clerk

877 8-82 4M * OSP

APPENDIX D

SECTIONS 511, 521, and 525, SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 50 U.S.C.APP. §§501, et seq.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 50 U.S.C.App.

§511. Definitions

(2) The term "period of military service", as used in this Act [said sections], shall include the time between the following dates: for persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

§521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his

military service.

§525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such

period which occurs after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

APPENDIX E

CALIFORNIA CODE OF CIVIL PROCEDURE §583

CALIFORNIA CODE OF CIVIL PROCEDURE

§583 Dismissal; lack of prosecution; failure to bring action to trial

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.

84-257

No. _____

Office - Supreme Court, U.S.
FILED
SEP 20 1984
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1984

THE CITY OF LOS ANGELES, a Municipal Corporation, ROBERT F. GALLEGOS, JAN J. HARRIS, and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER, and VICTOR BUTTLER,

Respondents,

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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A Professional Corporation
GODFREY ISAAC
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TOPICAL INDEX

	PAGE
TABLE OF AUTHORITIES.	ii
TABLE OF APPENDICES	v
OPINION BELOW	2
JURISDICTION.	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT.	9
CONCLUSION.	34

TABLE OF AUTHORITIES

CASES PAGE

Bennett v. Letterly,
74 Cal.App.3d 901,
141 Cal.Rptr. 682 (1977) . . 17

Carr v. United States,
422 F2d 1007 (4th Cir.
1970). 5, 13

Christin v. Superior Court,
9 Cal. 2d 256, 71 P2d
205 (1937) 22

Clark v. Mechanics' Amer.
Nat. Bank,
282 F 879 (8th Cir. 1922). . 14

Cost v. Ash,
422 U.S. 66, 95 S.Ct. 2080,
45 L.Ed. 2d 26 (Cal. 1975) . 25

Crowder v. Captial
Greyhound Lines,
169 F2d 674 (D.C.
Cir. 1948) 26

Cruz v. General Motors
Corp.,
308, F. Supp. 1052
(S.D.N.Y. 1970). 5

CASES (Continued) PAGE

Estate of Madison,
26 Cal. 2d 253, 159 P2d
630 (1945) 17

Fanin Corp. v. Superior
Court,
36 Cal.App.3d 745,
111 Cal.Rptr. 920 (1974) . . 23

Gross v. Williams, et al.,
149 F2d 84 (8th Cir. 1945) . 26

Kaiser Foundation Hospitals
v. Superior Court,
185 Cal.App. 2d 177,
8 Cal.Rptr. 781 (1960) . . . 28

Pacific Greyhound Lines
v. Superior Court,
28 Cal. 2d 61, 168 P2d
665 (1946) . . . . . passim

Rauer's Law Etc. v. Higgins,
76 Cal.App.2d 854, 174
P2d 450 (1946) 29

Tabor v. Miller,
389 F2d 645 (3rd Cir. 1968). 26

Thorpe v. Housing of City of
Durham,
393 U.S. 269, 89 S.Ct. 518,
L.Ed. 2d 474 (1969). 34

CASES (Continued) PAGE

U.S. v. Thirty Seven Photographs, 402 U.S. 363, 91 S.Ct., 1400, 28 L.Ed. 2d (Cal. 1971) reh. denied, 403 U.S. 924. 25

Zitomer v. Holdsworth, 449 F2d 725 (3rd Cir. 1971). 18-21

STATUTES

California Code of Civil Procedure § 583(b) . . . . . passim

Soldiers' and Sailors' Civil Relief Act, (Public Laws, ch. 888, § 205, 54 stat. 1181). . . 5, 10, 18

Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525 . . . passim

TABLE OF APPENDICES

APPENDIX A:

Opinion of the California Court of Appeal, Second Appellate District. A-1

APPENDIX B:

Soldiers' and Sailors' Civil Relief Act, Public Laws Ch. 888, § 205, 54 1181. B-1

APPENDIX C:

Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. § 525. C-1

APPENDIX D:

California Code of Civil Procedure § 583(b) D-1

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE CITY OF LOS ANGELES, a Municipal Corporation, ROBERT F. GALLEGOS, JAN J. HARRIS and DWAYNE T. MERRILL,

Petitioners,

vs.

LEROY BUTTLER, DONALD BUTTLER and VICTOR BUTTLER,

Respondents.

OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

The Respondents, LEROY BUTTLER, DONALD BUTTLER and VICTOR BUTTLER, respectfully submit that the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District filed in this case on March 22, 1984, is correct and in accordance with

settled principles, and should not be further reviewed.

Further, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

OPINION BELOW

The Opinion of the Court of Appeal of the State of California, Second Appellate District is reported at 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984), and is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The decision of the Court of Appeal herein is correct, and in accordance with settled principles and should not be further reviewed. Respondents received the Petition for Writ of Certiorari on August 20, 1984, and are

timely filing this Opposition of the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Soldiers' and Sailors' Civil Relief Act, § 525 Public Laws, ch. 888, § 205, 53 stat. 1181. Appendix B-1

   Soldiers' and Sailors' Civil Relief Act, § 521 § 525 (50 U.S.C. App. § 525, §521) Appendix C-1

2. California Code of Civil Procedure, § 583(b) Appendix D-1

STATEMENT OF CASE

Respondents hereby incorporate by reference as though fully set forth herein the facts set forth in the Appellate Opinion herein. (Appendix A-3 - A-7)

SUMMARY OF ARGUMENT

The Appellate Court's opinion is correct. The Court held that the language of § 525 of the Relief Act, the tolling provision, governs time limitations such as California C.C.P. § 583(b) brought by military service-people. The purpose of § 525 is to protect the rights of members of the military who are away from home defending our Nation and enable them to devote all their energy to our Nation's

defense without the worries and distractions attendant to litigation. Cruz v. General Motors Corp., (308 F. Supp. 1052 (S.D.N.Y. 1970), Carr v. United States, 422 F2d 1007 (4th Cir. 1970) The language of § 525 does not use the words "statute of limitations" (Public Laws, ch. 888, § 205, 54 stat. 1181) although as the Court noted, this phrase was surely in the lexicon of Congress. However, Petitioners argue that this Court should ignore the actual words of Congress and instead follow a West's publisher's headnote which appears in the Annotated version of the Relief Act (Petition, at p. 15) The language Congress chose, "any period . . .

limited by the law . . . for the bringing of any action or proceeding in any court . . ." is broad enough to include a law requiring dismissal unless an "action is brought to trial within five years . . ." (C.C.P. § 583). Importantly, it is during the period between filing the Complaint and bringing the action to trial that the "worries and distractions" of litigation commonly arise necessitating the protection of § 525. The court held there was no rational basis for applying § 525 to limitation periods for initiating an action but not applying it to a limitation period for bringing an action to trial. Moreover, to hold otherwise would discourage people who have already filed

lawsuits from enlisting in the military.

The Appellate Court's interpretation of § 521 of the Relief Act is not in conflict with other Federal Court of Appeal decisions. The settled law is that § 521 mandates a postponement of trial unless the ability of the military serviceperson to prosecute or defend is not materially affected by his or her absence. Pacific Greyhound Lines v. Superior Court, 2 Cal 2d 61, 168 P2d 665 (1946) Petitioners do not cite any Federal Court of Appeal decisions which alter or modify this standard. Moreover, contrary to Petitioners' argument, it is undisputed that the fact that a military serviceperson does not

formally apply for a stay pursuant to the Relief Act does not preclude a Court from later considering, for purposes of C.C.P. § 583 (b), whether a stay would have been mandatory, had it been applied for. Pacific Greyhound, supra.

Pursuant to § 525 of the Relief Act, C.C.P. § 583 (b) was tolled, and the suspended time period cannot be retroactively extinguished.

The Appellate Court's decision neither abrogates the function of § 521, nor the purposes of § 525; it simply recognizes and affords the rightful protections to military servicepeople who may also be involved in litigation at home.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEAL IS CORRECT AND SHOULD NOT BE FURTHER REVIEWED.

A.

The Appellate Court's application of section 525 of the Relief Act was proper.

Petitioners contend that § 525 of the Relief Act applies only to statutes of limitations, and not any other time limitations. Yet, Petitioners do not cite one case, law or statute to substantiate this claim. The sole support for this contention is a West's publisher's headnote which appears in the

annotated version of the Relief Act which is in the Annotated United States Code. The Relief Act itself contains no such wording or limitation. (See Public Laws; Ch. 888, § 205 (54 Stat. 1181; Appendix B-1.) The Appellate Court specifically pointed out this vital distinction.

The Court noted:

> "The phrase, 'statute of limitation' appears in a headnote to section 525 of West's United States Code Annotated (1981) at page 291. The phrase does not appear in the Act itself. (See Public Laws; Ch. 888, § 205 (54 Stat. 1181.); 153 Cal.App.3d 520, 200 Cal. Rptr., 372 (1984) (footnote 3; Appendix A13 - A14)

The Court went on to find:

> "We find no rational basis for applying section 525 of the Act to limitation periods for initiating an

> action but not applying it to the limitation period for bringing an action to trial. The language of section 525 does not use the words 'statute of limitations' although this phrase was surely in the lexicon of Congress in 1940. The language Congress chose, 'any period . . . limited by any law . . . for the bringing of any action or proceeding in any court . . .' is broad enough to include a law requiring dismissal unless an 'action is brought to trial within five years'. . ." (Code of Civil Procedure, § 583(b).) (153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984); (Appendix A13 - A14)

Inexplicably, in the face of the written words of the Relief Act itself, and despite the distinction specifically noted by the Appellate Court, Petitioners choose to ignore the clear difference between the actual words of the Relief Act and

the West's annotated headnote which does not even appear in the Relief Act. Instead, Petitioners erroneously state that the Appellate Court "while admitting that the phrase 'statutes of limitation' appears in the title of § 525 . . ., the Court conveniently ignored the fact that a statute's title may reveal the clear intent of the statute." (Petition at p. 15) Petitioners have latched on to a headnote and are urging this Court to adopt the proposition that a publisher's phrase in a legal reference book takes precedence over the actual words of Congress. This argument is as ludicrous as it is insulting.

The intent and purpose of the Relief Act is undisputed and was expressly recognized and followed by the Court of Appeal herein:

> "To protect members of the military service who are unable to attend to their legal affairs because they are stationed away from home . . ." (153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984) (Appendix A-11)

As the Court in Carr v. United States, 422 F. 2d 1007 (4th Cir. 1970) noted, the Relief Act

> "was intended to enable persons serving in the armed forces 'to devote their entire energy to the defense of the Nation' without worries and distractions which are involved in the conduct of litigiation".

The Appellate Court's opinion discusses the predecessor of the Relief Act, and the initial interpretation

of it by the Court in Clark v. Mechanics American Nat. Bank, 282 F. 589 (8th Cir. 1922). Clark noted the same intent of liberally construing the Act to protect the rights at home of those in the military unable to give attention to their business matters. 153 Cal.App.3d 520, 200 Cal. Rptr. 720 (1984) (Appendix A-13)

The Appellate Court herein correctly held:

> "We find no rational basis for applying section 525 of the Act to limitation periods for initiating an action but not applying it to the limitation period for bringing an action to trial . . . it is during the period between filing the complaint and bringing the action to trial that the 'worries and distractions' of civil litigation will commonly arise necessitating

the protection of section 525 . . ."
(153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984) (Appendix A-13 - A15)

Importantly, the Court noted:

"Thus, we conclude that tolling the five-year limitation period is entirely consistent with the purposes of section 525. Indeed to hold otherwise would discourage persons who already have filed lawsuits from enlisting in the armed services."
(153 Cal.App.3d 520, 200 Cal. Rptr. 372 (1984) (Appendix A-15)

The court went on to note:

"Furthermore, to dismiss the action of a Plaintiff in military service for failure to prosecute would be an idle gesture in many cases because a second action by Plaintiff would not be time-barred by virtue of section 525's conceded applicability to statutes of limitation. (See Hill v. City and County of San Francisco (1969) 268 Cal.App.2d 874,

876; Billups v. Tiernan (1970) 11 Cal.App.3d 372, 375-376.) This point was succinctly made in Cahill v. Northeast Airlines, Inc. 344 N.Y. Supp.2d 372, (1973). There, the court held that dismissal of plaintiff's negligence action for want of prosecution was properly denied where plaintiff was in military service and a second action would not be time-barred due to the tolling provision of section 525. 'If this action were dimissed for want of prosecution,' the court observed, 'a second action by [plaintiff] would not be time-barred by the applicable Statutes of Limitation, by virtue of the tolling provisions contained in . . . [section 525] of the federal Soldiers' and Sailors' Civil Relief Act of 1940. . . . Under such circumstances . . . it would be an idle gesture to dismiss this otherwise dismissable action.' (Id. at p. 373.) Since we construe section 525 to toll the five-year limitation period as applied to actions by members of the military service we avoid this anomalous

result."

Petitioners' arguments never reach nor dispute this perceptive analysis. It is clear that by its decision, the Court of Appeal properly, fulfilled its inherent function of interpreting and applying statutory and case law. Estate of Madison, 26 Cal. 2d 453, 159 P2d. 630, (1945); Bennett v. Letterly, 74 Cal.App.3d 901, 141 Cal. Rptr. 582, (1977). However, Petitioners attempt to distort the Appellate decision. A prime example of this appears at page 16 of the Petition. Petitioners contend that the Appellate Court ignored "Congress' obvious intent" of the "use" of the term "statute of limitations" in § 525, and

further, blatantly create a legal fantasy as to what Congress "clearly intended" by that phrase, all the while neglecting to mention in their Petition that Congress never used the term "statute of limitations". (Public Laws, Ch. 888, § 205, 54 Stat. 1181 (Appendix B-1)

Petitioners next erroneously assert that the Appellate decision is in conflict with a Third Circuit Court of Appeal case, Zitomer v. Holdsworth, 449 F.2d 724 (3rd Cir. 1971). The facts in Zitomer are not only totally dissimilar to this case, but Petitioners have also improperly articulated its holding. In Zitomer, the Plaintiff, who was

not in the military, moved for a continuance of trial based on the fact that the Defendant was on duty in the military. The Court dismissed for lack of prosecution. Plaintiff resisted, contending that §525 justified his failure to prosecute. The Court of Appeal found that §525 was not applicable to the Plaintiff; the Court made no finding as to whether §525 may have been applicable to the Defendant serviceperson, had he attempted to invoke it. The Plaintiff in Zitomer did not fail to prosecute his action because he was in the military, but, instead tried to justify his failure by asserting Defendant's period of military

service as a "sword" to bar dimissal. (The Court noted that the Defendant had not availed himself of the Act's provisions; there would obviously be no reason for him to do so, since it would be in Defendant's best interest to let the limitation period run and have the case dismissed). In the matter herein, Respondents properly invoked the Relief Act's provisions since Respondent, VICTOR BUTTLER, was in the military. Petitioners' attempt to skewer facts and re-assemble the law must not be allowed. The instant Appellate decision is not in direct conflict with Zitomer, as Petitioners allege, but is a proper and non-conflicting

opinion.

B.

The Appellate Court's interpretation of §521 of the Relief Act is not in conflict with other Federal Court of Appeal decisions.

The Court of Appeal has interpreted the Relief Act in a manner fully consistent with both the well-settled purposes of the Relief Act and the inherent purposes of California Code of Civil Procedure, § 583 (b) (Appendix D-1), including its judicially implied "impossible, impracticable and futile" exception. The true nature and intent of Code of Civil Procedure, § 583 (b) has

long been recognized by California Courts. As the California Supreme Court has stated:

> "The purpose of [C.C.P. § 583(b)] is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years . . . and, as we have already pointed out, despite the mandatory language, implied exceptions are recognized." Christin v. Superior Court, 9 Cal.2d 526, 71 P2d 205 (1937) (Emphasis in original)

The plain intent of C.C.P. § 583 (b), and more particularly of the "impossible and futile" exception, is not to set up an arbitrary five year limitation period, but rather, to insure that cases are brought to trial within a reasonable time in light of all the circumstances in each

case. Fanin Corp. v. Superior Court. 36 Cal.App.3d 745, 111 Cal.Rptr. 920 (1974). There are any number of "circumstances" which make bringing a case to trial within five years "impossible, impracticable or futile". The Court of Appeal's decision in this case acknowledged that the protections afforded Respondent, VICTOR BUTTLER, by the Relief Act made bringing the case to trial "objectively impossible". (153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984) (Appendix A-21)

Petitioners contend that there is "confusion which surrounds application of the Relief Act in California". (Petition, page 21) No

such confusion exists in the Courts' decisions, and an analysis of Petitioners' cited cases reveal that the only confusion regarding the Relief Act is Petitioners'.

The Appellate Court noted:

> "Our Supreme Court has interpreted section 521 as mandating a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal. 2d 61, 67; see also, Rauer's Law, supra, 76 Cal.App.2d at p. 858; Kaiser Foundation Hospitals v. Superior Court (1960) 185 Cal.App.2d 177, 182; and Boone v. Lightner (1942) 319 U.S. 561, 575." (153 Cal.App.ed 520, 200 Cal. Rptr. 720 (1984) (Appendix A-20)

Pacific Greyhound has been consistently acknowledged and followed by

California Courts; there simply is no "confusion" as Petitioners contend. Since Petitioners cannot dispose of the controlling case of Pacific Greyhound, they change tactics and attempt to analyze California Code of Civil Procedure, § 583 (b). This is an issue which is improperly raised herein, since the practice of the U.S. Supreme Court is to defer to the determination of the Court of Appeal of state law. Cost v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (Ca 1975); U.S. v. Thirty Seven Photographs, 402 U.S. 363, 91 S.Ct., 1400, 28 L.Ed 2d (Cal 1971) reh denied, 403 U.S. 924. In any event, the Court of Appeal properly

interpreted C.C.P., §583(b), and it needs no review. (See Respondents' Brief in Opposition, p.21-25 supra and 153 Cal.App.3d 520, 200 Cal.Rptr. 372 (1984) (Appendix A18 - A22)

In a last ditch effort to argue the instant decision is in "conflict with Federal Circuit Court of Appeal opinions", Petitioners cite three cases which do not help them. (Petition, p. 29-30) The holdings and rationales of Gross v. Williams, et al. 149 F2d 84 (8th Cir. 1945), Tabor v. Miller, 389 F2d 645 (3rd Cir 1968), and Crowder v. Capital Greyhound Lines, 169 F2d 674 (D.C. Cir. 1948) confirm Respondents' argument and are consistent with the Opinion herein, that a trial

court only has discretion to deny a stay under § 521 where it finds the serviceperson's rights will not be "materially affected" by his or her absence from the proceedings. The facts of this case demonstrate that Respondents' rights were in fact materially affected by VICTOR BUTTLER'S military service and Respondents were entitled to the protection of § 521. The fact remains that the Appellate Court's opinion is proper.

C.

A Formal Application of a Stay Order does not preclude a court from granting a stay.

The California Supreme Court in Pacific Greyhound, supra stated:

> "Here no application for a stay was actually made to the court but the failure to apply for a stay did not preclude the court, upon the motion to dismiss, from determining whether, under all the facts and circumstances, a stay would have been mandatory if it had been applied for." (Pacific Greyhound, surpa, at P. 67)

In Kaiser Foundation Hospitals v. Superior Court, 185 Cal.App.2d 177, 8 Cal. Rptr. 181, (1960), the Court of Appeal reaffirmed the Supreme Court's holding in Pacific Greyhound, supra:

> "Neither in the Greyhound case nor in this case was there any application for a stay but . . . . the failure to apply for a stay did not preclude the court, upon the motion to dismiss from determining whether, under all the facts and circumstances, a stay

> would have been mandatory if it had been applied for . . . (Kaiser, supra, at p. 180)
>
> See also Rauer's Law Etc.

v. Higgins,76 Cal.App.2d 854, 174 P2d 450 (1946)

The Appellate Decision herein, in accordance with the settled principles of law, states:

> "Here no application for a stay was actually made but that does not preclude the court from considering, for purposes of §583, subdivision (b), whether a stay would have been mandatory if it had been applied for (Pacific Greyhound, supra, Rauer's Law, supra.) (153 Cal.App.3d 520, 200 Cal. Rptr. 372, (1985) (Appendix A21)

The record reflects that Respondent, VICTOR BUTTLER'S, absence, due to his active duty in

the military, made the prosecution of this case impossible, impractical and futile, and a stay would have been mandatory, if it had been applied for. Nevertheless, the law is clear that the application for the stay is not required, and Petitioners' assertion to the contrary goes against the law.

D.

Code of Civil Procedure, §583(b) was tolled for the period Respondent, VICTOR BUTTLER, was in the Navy.

Petitioners' arguments demonstrate that they do not understand the meaning of "tolling". When Respondent, VICTOR BUTTLER, was in the U.S.

Navy, the time periods involved in his case were tolled, the clock was stopped. Specifically, for two years and seven months, the length of VICTOR BUTTLER'S military service, all time periods were suspended. Shortly after VICTOR BUTTLER got out of the Navy, the time period began again, --the clock started-- and the two years and seven months are then added onto any time limitation. Thus, when Petitioners' Motion to Dismiss was brought in January, 1982 Even though VICTOR BUTTLER was not in the military at that time, the tolling period while he was in the service still existed. Yet, Petitioners purport that after a serviceperson's

discharge, the tolling periods are wiped out. This illogical position defies legal understanding. A period of two years and seven months was tolled herein, and that suspended time period remains valid and effective. Petitioners cannot retroactively start the clock that the law rightfully holds has stopped.

E.

The Appellate Court's Decision Correctly interpreted Federal Law.

The Appellate Court's ruling abrogates neither the function of Section 521 of the Act, nor the purposes of Section 583 (b); it merely recognizes the established principles of the

Relief Act. California Courts may still grant or deny motions to dismiss actions where servicepersons are parties. The Court's ruling specifically applies to protect servicepersons by making the tolling of the five year provision of Section 583 (b) mandatory with respect to servicepeople who are on active duty and thus unable to protect their rights themselves. To deny protection to those people who give up years of their own lives to serve our Nation would be a grave injustice. Petitioners' contentions as to the alleged impact of the instant decision are unfounded and based upon improper hypotheticals. It has long been held that this Court will not

decide such unnecessary hypothetical matters and Petitioners' argument must fail. Thorpe v. Housing of City of Durham, 393 U.S. 268, 89 S.Ct. 518, L.Ed.2d 474 (1969)

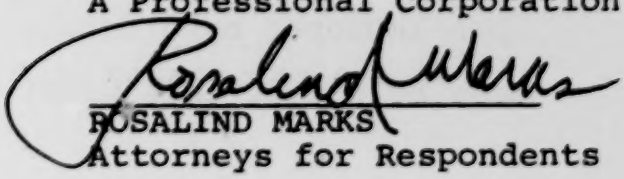
CONCLUSION

Based on each and every of the foregoing reasons, Respondents respectfully submit that the decision of the California Court of Appeal was proper, and in accordance with the law, and it should not be further reviewed.

DATED: Sept. 17, 1984

Respectfully submitted,

ISAAC & MARKS
A Professional Corporation



ROSALIND MARKS
Attorneys for Respondents

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

LEROY BUTTLER, et al.,	2d Civ. 68467
Plaintiffs and Appellants.	(LASC No. C181 072)
vs.	
CITY OF LOS ANGELES, et al.,	
Defendants and Respondents.	

APPEAL from an order of the Superior Court of Los Angeles County. Arthur Baldonado, Judge.

Reversed.

Isaac & Marks and Godfrey Isaac and Rosalind Marks for Plaintiffs and Appellants.

Ira Reiner, City Attorney, John T. Neville, Senior Assistant City Attorney, Richard M. Helgeson, Assistant City Attorney and Katherine J. Hamilton, Deputy City Attorney for Defendants and Respondents.

This is an appeal from an order dismissing plaintiffs' action for failure to bring the case to trial within five years of its commencement and from an order denying plaintiffs' motion to vacate the order of dismissal. For the reasons set forth below, we reverse the dismissal order. We do not reach the order denying the motion to vacate.

FACTS AND PROCEEDINGS BELOW

On November 19, 1976, plaintiff Victor Buttler, his brother Donald, and their father Leroy filed suit against the defendants City of Los Angeles and eight of its police officers. Their complaint alleged that plaintiffs had been the victims of false arrest, false imprisonment, assault and battery by the defendant officers.

Plaintiffs began to prosecute their action in a diligent manner. One week after defendants answered the complaint plaintiffs filed their At-Issue Memorandum. Plaintiffs responded to interrogatories propounded by defendants in May, 1977 and in

August, 1977 propounded their own interrogatories to defendant.

The superior court issued its first notice of eligibility to file a certificate of readiness in March 1979. By that time plaintiff Victor Buttler was on active duty in the United States Navy stationed on board a ship in Rota, Spain.

Victor Buttler commenced active military service on November 6, 1978. He did not appear in response to defendants' notices of deposition in December 1978 and February 1980.

In January 1982 the matter not having been brought to trial within five years, defendants moved to

dismiss pursuant to Code of Civil Procedure section 583(b). Plaintiffs resisted this motion on the ground that plaintiff Victor Buttler had been on active duty in the United States Navy between November 1978 and June 1981 and that the five-year period was suspended as to all three plaintiffs during Victor Buttler's military service by reason of the Soldiers' and Sailors' Civil Relief Act (hereafter referred to as the "Act".)

At the hearing on defendant's motion to dismiss, the trial court made a tentative ruling denying the motion provided that plaintiffs move to specially set the matter

for trial within sixty days. This ruling was made conditional on whether the Act applied to plaintiffs as well as defendants. The court requested supplemental points and authorities on this issue. After receiving the parties' supplemental briefs, the trial court granted defendants' motion to dismiss. Plaintiffs' motions for reconsideration and for relief on the ground of their mistake of law were denied. Plaintiffs also requested a Statement of Position from the court regarding, inter alia, the application of the Act to plaintiff Victor Buttler. The court did not respond to this

request.[1]

DECISION

We first consider whether the trial court erred in dismissing Victor Buttler's action. The Act provides in relevant part:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court . . . by or against any person in military service or by or against his heirs, executors, administrators, or assigns. . . ."
> (50 U.S.C. App. § 525.)

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[1] We recognize that section 632 of the Code of Civil Procedure by its terms only applies to the trial of a question of fact. Nevertheless it would have been helpful if the trial court had clarified the ambiguity in the reasoning behind its order. We

(Continued)

Application of the tolling provision of Section 525 of the Act is mandatory as to any person in military service; it does not require a showing of prejudice by reason of such service. (Syzemore v. County of Sacramento (1976) 55 Cal.App.3d 517, 322-524.)

1/ (Continued)

cannot determine, for example, whether the trial court believed that the Soldiers' and Sailors' Civil Relief Act does not apply to military personnel who are plaintiffs, or believed that the Act does not apply to Victor Buttler. Nor can we determine, in referring to the Act, the court was referring to sections 525 or 521 or both. Ordinarily the trial court's reasoning in granting or denying a motion is irrelevant but, as we explain infra, the way in which the case interpreted the Act does make a difference in this case with respect to the dismissal against appellants Donald and Leroy Buttler.

The only question is whether section 525 suspends the running of time limitations that are not statutes of limitations but which govern procedures in actions already brought such as the five-year limitation contained in section 583, subdivision (b) of the Code of Civil Procedure. We have found no California case directly on point.[2/]

[2/] In Rauer's Law Etc. Co. v. Higgins (1946) 76 Cal.App.3d 854, the plaintiff contended that the five-year limitation period was tolled by section 525 of the Act. The court did not decide this question because it found that that section did not apply to suits such as plaintiff's filed before the passage of the Act. (Id., at pp. 857-858.)

In Thornley v. Superior Court (1949) 89 Cal.App.2d 662, the defendant moved to dismiss the action on the ground that he had not been served with

(Continued)

From our examination of the purposes of the Act and the logical consequences of its language, we have concluded that section 525 tolls the five-year limitation period of Code of Civil Procedure section 583, subdivision (b) as to actions brought by members of the military service.

2/ (Continued)

a summons within three years of the commencement of the action. (Code Civ. Proc., § 581, subd. (a).) The plaintiff argued that the time for service was tolled by section 525 while defendant was in the military. The court declined to construe section 525 as suspending the mandatory requirement of service noting that section 525 "was enacted for the benefit of one in the military services and that it is not available beyond its express terms to his adversary to excuse his non-compliance with the mandatory provisions of

(Continued)

The purpose of the tolling provisions of the Act is to protect members of the military service who are unable to attend to their legal affairs because they are stationed away from home in active service or recovering from injuries incurred in active service. (Cruz v. General Motors Corporation (S.D.N.Y. 1970) 308 F.Supp. 1052, 1057.) As one court noted, the Act "was intended to enable persons serving in the armed forces 'to devote their entire energy to the

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2/ (Continued)

the state "statute". (Id., at p. 644.) The policy considerations in the instant case are significantly different from those in Thronley and compel a different result.

defense needs of the Nation without the worries and distractions which are involved in the conduct of litigation." (Carr v. United States (4th Cir. 1970) 422 F.2d 1007, 1012.) And, in interpreting the predecessor of the current Act, it was stated that its "purpose [is] to extend protection to persons in military service in order to prevent injury to their civil rights during their terms of service and to enable them to devote their entire energy to the military needs of the nation . . . A statute of this nature should be liberally construed in favor of the rights of the man engaged in military service, absorbed

by the exacting duties required of him, and unable to give attention to matters of private business." (Clark v. Mechanics' American Nat. Bank, (8th Cir. 1922) 282 F. 589, 591.)

We find no rational basis for applying section 525 of the Act to limitation period for bringing an action to trial. The language of section 525 does not use the words "statute of limitation" although this phrase was surely in the lexicon of Congress in 1940.[3/] The

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[3/] The phrase "statute of limitation" appears in a headnote to section 525 of West's United States Code Annotated
(Continued)

language Congress chose, "any period . . . limited by any law . . . for the bringing of any action or proceeding in any court . . . ," is broad enough to include a law requiring dismissal unless an "action is brought to trial within five years . . . ." Code Civ. Proc., § 583, subd. (b).) Moreover, it is during the period between filing the complaint and bringing the action to trial that the

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3/ (Continued)

(1981) at page 291. The phrase does not appear in the Act itself. (See Public Laws, Ch. 888, § 205, 54 Stat. 1181.)

"worries and distractions" of civil litigation will commonly arise necessitating the protection of section 525. Thus, we conclude that tolling the five-year limitation period is entirely consistent with the purposes of section 525. Indeed to hold otherwise would discourage persons who already have filed lawsuits from enlisting in the armed services. To serve their country they would have to risk dismissal of their actions for want of prosecution during a time they may not be in a position to diligently pursue those lawsuits.

Furthermore, to dismiss the action of a plaintiff in military

service for failure to prosecute would be an idle gesture in many cases because a second action by that plaintiff would not be time-barred by virtue of section 525's conceded applicability to statutes of limitation. (See Hill v. City and County of San Francisco (1969) 268 Cal.App.2d 784, 876; Billups v. Tiernan (1970) 11 Cal.App.3d 372, 375-376.) This point was succinctly made in Cahill v. Northeast Airlines, Inc. (1973) 344 N.Y.Supp.2d 372. There, the court held that dimissal of plaintiff's negligence action for want of prosecution was properly denied where plaintiff was in military service and a second action would not be time-barred due

to the tolling provision of section 525. "If this action were dismissed for want of prosecution," the court observed, "a second action by [plaintiff] would not be time-barred by the applicable Statutes of Limitation, by virtue of the tolling provisions contained . . . [section 525] of the federal Soldiers' and Sailors' Civil Relief Act of 1940 . . . . Under such circumstances . . . it would be an idle gesture to dismiss this otherwise dismissable action." (Id. at p. 373.) Since we construe section 525 to toll the five-year limitation period as applied to actions by members of

the military service we avoid this anomalous result.

Our holding that section 525 tolls the period for bringing an action to trial only applies to Victor Buttler. As to him the time for bringing his claim to trial is tolled during the period he was in active military service. The Act does not apply directly to co-plaintiffs Leroy and Donald Buttler who were not in military service during the course of this litigation. (Wanner v. Glen Ellen Corporation (D. Vt. 1974) 373 F.Supp. 983, 986.)

However, during the time he was on active duty and for sixty

days thereafter, Victor Buttler also was entitled to the protection of section 521 of the Act which provides in relevant part, "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act . . . unless, in the opinion of the court, the ability of plaintiff to prosecute the

action or the defendant to conduct his defense is not materially affected by reason of his military service." (50 U.S.C. App. § 521.)

Our Supreme Court has interpreted section 521 as mandating a postponement of trial unless the court is satisfied that by going forward the ability of the person in military service to prosecute or defend would not be materially affected. (Pacific Greyhound Lines v. Superior Court (1946) 28 Cal.2d 61, 67; see also, Rauer's Law, supra, 76 Cal.App. 2d at p. 858; Kaiser Foundation Hospitals v. Superior Court (1960) 185 Cal.App.2d 177, 182; and Boone v. Lightner (1942) 319 U.S. 561, 575.

Here no application for a stay was actually made but that does not preclude the court from considering, for purposes of section 583, subdivision (b), whether a stay would have been mandatory if it had been applied for. (Pacific Greyhound Lines v. Superior Court, supra, 28 Cal.2d at p. 67; Rauer's Law, supra, 76 Cal.App.2d at p. 858.) If Victor Buttler could have invoked section 521 of the Act to block the other plaintiffs from going to trial then, as a matter of law, it would have been objectively impossible for them to prosecute their actions while he was in military service. Thus it may have been "futile" for

the other plaintiffs to have sought a trial while Victor was in the service since he would have been entitled to stay that trial.

It does not appear from the record that tne trial court considered the possibility Donald and Leroy Buttler's prosecution of their claims in his absence could be prejudicial to Victor Buttler's ability to prosecute his action. The focus of the argument in the trial court was on whether Victor Buttler's absence was prejudicial to Donald and Leroy Buttler. Moreover, the trial court's tentative decision that it would overrule the defendant's motion if the Act applied to plaintiffs as well as to defendants

coupled with its subsequent granting of the defendants' motion to dismiss is some indication that the court did not believe the Act applied to plaintiffs and, therefore, did not consider the prejudice to Victor Buttler if his co-plaintiffs had proceeded to try their claims.

We recognize trial courts have wide discretion in weighing the factors excusing compliance with 583 (b) and ordinarily defer to their decision. However, the absence of the statement of decision requested by appellants makes it impossible for this court to ascertain how much the trial court's rationale for dismissing Donald and Leroy's actions would be disturbed by

our holding that 50 U.S.C. 525 tolled Victors closely related action while he was in the service and our observation that under 50 U.S.C. 521 Victor may have been entitled to stay the other actions as well as his own because of prejudice to him from a separate trial of those lawsuits. We are reversing the order of dismissal as to Leroy and Donald Buttler so that the trial court can reconsider the matter in this light. In doing so, we do not mean to dictate how the trial court exercises its discretion as to the dismissal of Donald and Leroy Buttler's actions. We only direct that it conduct an examination of this new configuration of factors and then apply its

discretion to that altered set of facts.

DISPOSITION

The order dismissing the action is reversed and the case is remanded for further proceedings consistent with this opinion.

CERTIFIED FOR PUBLICATION

_____

JOHNSON J.

We Concur:

_____

SCHAUER, P.J.

_____

THOMPSON J.

APPENDIX B

CHAPTER 888, SECTION 205

(SOLDIER'S & SAILOR'S CIVIL

RELEIF ACT OF 1940)

B-1

Chapter 888, Section 205

(Soldier's & Sailor's Civil

Relief Act of 1940)

The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators or assigns whether such cause of action shall have accrued prior to or during the period of such service.

APPENDIX C

SECTIONS 525 and 521

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT, 50 U.S.C. App. §§ 501, et seq.

§525. Statutes of limitation as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after the

date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment.

§521. Stay of proceedings where military service affects conduct thereof

At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter, may, in the discretion of the court in which

it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act [sections 501 to 591 of this Appendix], unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

APPENDIX D

CALIFORNIA CODE OF CIVIL PROCEDURE §583

CALIFORNIA CODE OF CIVIL PROCEDURE

§583 Dismissal; lack of proscution; failure to bring action to trial

(b) Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended.